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IN THE
Supreme Court of the United States
OCTOBER TERM, 1962

No. 747

BOARD OF TRADE OF THE CITY OF CHICAGO,

Appellant,

v.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, THE NEW YORK CENTRAL RAILROAD
COMPANY, et al.,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

**BRIEF OF APPELLANT IN OPPOSITION
TO MOTION TO AFFIRM FILED BY
THE INTERSTATE COMMERCE COMMISSION**

On May 15, 1963, long after the time for filing such motions had expired, the Interstate Commerce Commission, one of the appellees herein, filed with the Court a motion to affirm the judgment of the lower court. In its motion, the Commission stated (p. 2, footnote 1) that the motion was "filed at the request of the Court made April 15, 1963." On April 15, 1963, the clerk of the Court addressed a letter to the Solicitor General, a copy of which was sent to all counsel of record, requesting that he

respond to the jurisdictional statements in this appeal and in No. 746. In response to such request, a memorandum stating the views of the United States was filed on May 15, 1963. We do not understand that the clerk's letter of April 15, 1963, was a request to the Commission to file a motion to affirm. We have been advised by the clerk, however, that the Commission's motion will be received by the Court and that we should reply thereto. Most of the points raised by the Commission have already been dealt with in the jurisdictional statement and in the brief filed in opposition to the motions to affirm which were filed by other appellees. Additional comments on the part of appellant, however, may be helpful to correct some of the Commission's erroneous statements and to place in the proper perspective other statements of the Commission, particularly those based upon arguments of appellant which the Commission has quoted out of context.

In its statement (Mot., p. 7), the Commission emphasizes the provision contained in its order of August 27, 1957, granting temporary fourth-section relief, to the effect that "The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."¹ This is a standard provision which the Commiss-

¹ The Commission also places emphasis on statements contained in the notices issued by the Board of Suspension and Division 2, acting as an appellate division, declining to suspend the proposed rates, where it was indicated that such action "does not constitute approval of the protested schedules" and that such schedules "may be made subject to investigation through formal complaint." Such notices have no bearing on the issues here presented. If no fourth-section application had been involved, any party aggrieved by the Commission's failure to sus-

sion includes in orders granting fourth-section relief, temporary or permanent. The inclusion of such a provision in a fourth-section order granting temporary relief has never been regarded by litigants or by the Commission itself as constituting notice that the Commission, in passing upon the question of permanent relief, would not consider whether the proposed rates would be "in conflict with any provision of the Interstate Commerce Act." On the contrary, the cases cited in Appendix F of appellant's jurisdictional statement show that the Commission has always, up to now, taken the position that it would consider, in such a case, whether the proposed rates would violate section 3.

The arguments made in the Commission's motion concerning the question of discrimination against Chicago grain interests (Mot., pp. 15-17) indicate that counsel for the Commission are either attempting to divert attention from the real issues or that they do not understand the basis for the charge of such discrimination.² Reference

(Footnote 1 continued)

pend would have had to file a formal complaint to bring the issues before the Commission. But, under section 4 of the Act, the Commission is required to conduct an "investigation." The Commission's representation (Mot., p. 7) that the temporary fourth-section order was issued "[u]pon completion of its investigation" is incorrect. The relief, by its own terms, was to continue only "until the effective date of the further order to be entered after hearing in fourth-section application No. 33955, as amended."

² The Commission's first argument (Mot., pp. 12-15) that "The only real question before the Commission was the level at which the rates were to be pegged" simply begs the question. The question before the Court is whether the Commission, in granting fourth-section relief, can ignore everything except the "level" of the rates.

is made (Mot., p. 15) to the statement in the Commission's report that Chicago "has the same stature as all other corn-processing points in official territory." The motion then says (Mot., p. 16) that the Board of Trade "admits that the Commission's findings of equal treatment are 'technically correct,'" from which the Commission argues (Mot., p. 16) that appellant's "admission that the Commission's findings are correct" shows that appellant's "allegations that the Chicago grain interests are seriously injured . . . are completely without merit."

The Commission's quotation from appellant's jurisdictional statement is taken out of context in an attempt to give it a meaning contrary to that which, in context, is readily apparent. As was pointed out in appellant's jurisdictional statement (p. 9), the finding of the Commission referred to deals only with the issue as to discrimination against Chicago processors. It does not deal with the discrimination against Chicago grain dealers. The major contention made by appellant is that Chicago grain dealers, who purchase and sell whole corn, cannot buy corn from elevators on the Kankakee Belt in competition with the Kankakee processor. This distinction was carefully explained in appellant's jurisdictional statement (pp. 8-9).⁸

The Commission also argues (Mot., p. 17):

But where, as here, little or no corn moves on the 72.5 cent rail rate over the Belt Line, the Board of Trade is hardly in any position to claim that the Chicago grain dealer is unduly prejudiced.

⁸ The Solicitor General apparently understands this distinction. See memorandum for the United States (pp. 7-8).

That is exactly the point of which appellant complains. The Chicago grain merchants purchase and store corn without regard to where it may ultimately be sold and shipped. That is a basic function of grain merchandisers. But these grain dealers, who desire to buy rail corn from stations on the Kankakee Belt, must bid for such corn on the basis of the 72.5-cent rate, whereas the Kankakee processor can bid for the corn on the basis of the 54.5-cent rate.⁴ That little, if any, corn has moved via Chicago since the 54.5-cent rate became effective is evidence of the injury which resulted from the violation of section 3(1) of the Act of which appellant complains.⁵

Respectfully submitted,

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Dated: May 31, 1963

⁴ The argument of the Commission that Chicago grain dealers previously had an advantage over Kankakee shippers not only is not pertinent to the issues in the case, but also is incorrect. The proportional rate from Chicago to the East, applicable on ex-barge as well as ex-rail corn (*Interstate Commerce Commission v. Mechling*, 330 U.S. 567 (1947)), applied via Kankakee with full milling-in-transit privileges.

⁵ As pointed out in appellant's jurisdictional statement (p. 8, footnote 5), the Commission noted that the NYC intended to remove this discrimination against Chicago grain dealers by removing the milling-in-transit limitation. This was never done.